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Supreme Court, U.S.
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No. 97-560

In The
Supreme Court of the United States
October Term, 1997

STEPHEN RIDDER,

Petitioner,

v.

CITY OF SPRINGFIELD, ET AL.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

RESPONDENT WALTER LAWRENCE'S BRIEF IN OPPOSITION

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I. QUESTIONS PRESENTED FOR REVIEW

The petitioner sets forth five issues which he seeks to have this Court review. The following questions more appropriately frame the issues as they relate to Dr. Lawrence:

A. Does a violation of 42 U.S.C. §1987 occur where the evidence fails to disclose that a physician was deliberately indifferent to a serious medical need?

B. Did the conduct of the magistrate deprive the petitioner of substantial justice?

II. PARTIES TO THE PROCEEDING

The petition accurately lists the parties to this proceeding. At the trial court level this action also involved the Clark County Prosecutor Steven A. Schumaker whom the petitioner voluntarily dismissed.

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IV. STATEMENT OF THE CASE

Contrary to the contentions of the petitioner, this action does not involve deliberate indifference to a serious medical need or conduct of the magistrate which resulted in "one of the grossest miscarriages of justice imaginable." Rather, it involves the failure of the petitioner to present evidence sufficient to overcome the summary judgment motion filed by Dr. Lawrence and the repeated failure of the petitioner to obey orders issued by the magistrate.

Dr. Lawrence did not serve as a contract (jail) physician during the petitioner's entire time of incarceration at the Clark County jail, but only for the time period of September 7, 1998 up through October 16, 1988. On September 14, 1988, pursuant to a policy of the Clark County Jail which required physical examination of a person whose incarceration was expected to last more than ten days, Dr. Lawrence performed a screening physical on the petitioner.

The screening physical included the taking of a medical history and the performance of a physical exam.

As a part of the medical history, the petitioner explained that he had cut his hand in July of 1988 when a guard came off a circular type saw. The petitioner never complained of any ongoing hand pain nor did he ask for any pain medication.

The physical examination disclosed that as a result of the circular saw accident the petitioner, prior to his incarceration, had received a severely debilitating injury to his hand which had resulted in loss of function of some blood vessels, nerves and tendons. This examination revealed that the petitioner had no open wound, had no chance of infection and had no need for any urgent or emergent medical treatment. The physical exam raised no medical concerns and Dr. Lawrence felt that the petitioner would not incur any further complication from the hand injury.

The screening physical resulted in Dr. Lawrence formulating medical opinions that the petitioner did not require physical therapy from a physical therapist, that physical therapy would not medically benefit the injured hand and that no ongoing need for medication existed. If a need for medication arose, a standing order issued by Dr. Lawrence permitted the jail nursing personnel to provide pain medication.

After the September 14 screening physical, Dr. Lawrence never received any request from the petitioner pertaining to surgery, never received anything from the petitioner's treating surgeon, and never had any knowledge of any scheduling of any further surgical procedure. The petitioner acknowledged that Dr. Lawrence never denied him any medication; that from September 14 up until November 1 when he started complaining about a toothache; he never made any formal written complaint concerning any claim

relating to an alleged denial of medical care or medication; he never called his mother or father to complain about any denial of medical care or medication; he never attempted to contact Dr. Lawrence; he never directed any request to any jail medical personnel for therapy; and from September 8 up until he started having trouble with a tooth in November, he never mentioned to any Clark County deputy any need for medical care or attention. Although the petitioner claims otherwise, Dr. Lawrence unequivocally testified that the likelihood of subsequent imprisonment in a state penitentiary played no role in the determination of any surgical procedure, physical therapy or treatment.

Dr. Lawrence, in his affidavit, provided the only admissible summary judgment evidence relating to any alleged deliberate indifference to a serious medical need and the state tort claim of medical malpractice. In his affidavit, Dr. Lawrence opined that at the time of the physical exam the

petitioner did not have any complication arising from the injury to his hand and the petitioner did not need any urgent or emergent medical care. Dr. Lawrence also expressed the medical opinions that he did not deny the petitioner appropriate medical care or treatment, did not deviate from any acceptable medical practice and that any alleged malpractice did not proximately result in any injury to the petitioner.

On January 4, 1990 the petitioner filed a complaint with the federal district court. This complaint included a section 1983 claim and a medical malpractice claim. The petitioner then proceeded to amend his complaint three separate times, the last amendment occurring on August 17, 1993. App. 343.

In late August of 1993 Dr. Lawrence filed an answer to the third amended complaint. This answer set forth various affirmative defenses, including the defense of qualified

immunity. In a motion for judgment on the pleadings filed on October Dr. Lawrence asked the trial court to determine the validity of the various defenses raised in his answer. Seventeen days later, without the benefit of any opposing memorandum, the magistrate, on October 18, denied the motion for judgment on the pleadings. App. 60.

The trial court also denied Dr. Lawrence's motion for severance and his request that the petitioner notify him whether the deposition of any person would relate to any claim against him. The trial court did grant the motion of Dr. Lawrence to bifurcate the medical treatment claims from the other non-medical claims. App. 117.

In a January 25, 1994 order setting a scheduling conference date, the magistrate ordered the parties to prepare and file a joint discovery plan. A portion of this plan, submitted by the parties on February 10, required the petitioner on or before May 15, 1994 to disclose experts and

to provide a report setting forth the opinions of each expert. The magistrate also issued an order which (1) required that the expert reports comply with Fed. R. Civ. R. 26(a)(2) and (2) called attention to the civil rule changes pertaining to expert reports.

On May 16, 1994 the petitioner filed purported expert reports. Since these reports did not comply with Rule 26(a)(2), the magistrate in an order filed in the middle of May of 1994, pointed out the deficiencies and granted the petitioner an additional fifteen days to correct the deficiencies. App. 108. The petitioner on May 23 filed a pleading to which he attached letters written by four physicians and a psychologist. Since this pleading and the attachments failed to conform to Rule 26(a)(2), the magistrate on June 2 struck these letters and held that these witnesses could not testify (expert preclusion order). App. 112. The petitioner then filed a motion seeking modification of the

preclusion order and requested an additional thirty days to comply with the expert report rule. The magistrate on July 11 denied this motion without prejudice to a reconsideration motion conditioned upon a showing of excusable neglect and upon the petitioner furnishing expert reports which complied with Rule 26(a)(2). App. 122.

Dr. Lawrence disclosed his experts and submitted a proper Rule 26(a)(2) expert report on August 12. After the discovery cut off date and after Dr. Lawrence submitted a summary judgment motion, the petitioner, on January 23, 1995, filed a motion seeking modification of the expert preclusion order. Part of this submission consisted of (a) a claim of excusable neglect predicated on counsel's ignorance of the law and (b) additional data from a psychologist and a non-treating physician. The magistrate, in a January 25 order, chronicled the history of the expert preclusion order, found an absence of excusable neglect and refused to modify the

previous preclusion order. App. 137. Some five days later, the petitioner filed another motion seeking modification of the expert preclusion order. Finding that the absence of the required expert reports resulted in none of the defendants deposing any expert identified by the petitioner, the magistrate stated:

> The Court has employed the sanction of excluding witnesses only as a last resort. When Plaintiff first failed to comply, the Court sua sponte allowed additional time within which to do so. Plaintiff failed to comply by the second deadline at the end of May and as late as July 11, the Court indicated its willingness to reconsider the exclusion if Plaintiff would actually file the required reports. It was only six months later, after discovery cut-off and summary judgment motions were filed, only six weeks before trial, that Plaintiff attempted to comply and then with supplemental reports which had apparently been in Plaintiff's hands since August 1994. As several Defendants note, Fed. R. Civ. P. 37 requires a preclusion of expert witnesses who are not properly

> disclosed unless there was substantial justification and the failure was harmless. Neither exception applies here. App. 161.

In opposition to the summary judgment motion filed by Dr. Lawrence on December 30, 1994, the petitioner filed unverified statements of two physicians. Dr. Lawrence moved to strike these unverified letters as well as the deposition testimony of the petitioner which purported to express medical opinions and medical conclusions. The trial court on February 28, 1995, granted the motion to strike and granted the summary judgment motion of Dr. Lawrence. App. 163.

The petitioner appealed the order granting summary judgment to the Sixth Circuit Court of Appeals. The latter appellate court, in rejecting the same contentions made by the petitioner in his certiorari petition, on March 13, 1997, upheld the order granting summary judgment. App. 1. The appellate

court also denied a motion for a rehearing en banc which the petitioner filed on April 28, 1997. App. 191.

V. REASONS FOR DENYING THE PETITION

The petition sets forth no reason which justifies the issuance of a writ of certiorari. While the petitioner alleges a conflict with decisions of other federal circuits, he cites no such decisions. In fact, the decision of the Sixth Circuit does not conflict with any other federal appellate decision. The petition does not involve any interpretation of any federal statute nor does it involve a departure from acceptable judicial conduct. Rather, the petitioner seeks yet another factual review of an appellate decision which the Sixth Circuit, after conducting a de novo review and after viewing all the facts and inferences in a light most favorable to the respondent, found that the magistrate correctly granted summary judgment to Dr. Lawrence.

A. The Absence of Any Genuine Issue Of Fact With Respect To The Section 1983 And Medical Malpractice Claims Required The Granting Of Summary Judgment.

Failure to provide adequate medical care to a non-indicted detainee violates the Due Process Clause of the Fourteenth Amendment and section 1983 provided the evidence discloses a deliberate indifference to a serious medical need. City of Revere v. Massachusetts General Hospital, 463 U.S. 239 (1988); see, Estelle v. Gamble, 429 U.S. 97, 104 (1976). Inasmuch as the evidence presented by Dr. Lawrence revealed that the petitioner did not need any urgent or emergent medical care and did not need any pain medication, the petitioner bore the burden of coming forward with factual evidence which created a genuine issue of fact as to the existence of a serious medical need. Celotex Corp. v. Caterett, 477 U.S. 317, 324 (1986). The petitioner failed to present any such evidence and the appellate court properly

sustained the order granting summary judgment to Dr. Lawrence.

Although the petitioner had sustained a severe injury before his incarceration, the undisputed evidence established that during the period of time Dr. Lawrence served as the jail physician the petitioner did not have a serious medical condition. Whether the petitioner needed further physical therapy or treatment was not obvious or a matter of common knowledge. The issues of therapy and treatment entail a "classic example of a matter for medical judgment" and do not involve deliberate indifference to a serious medical need. See, Estelle v. Gamble, supra at 107.

In order to establish a claim for medical malpractice, the petitioner had to produce some admissible evidence showing that Dr. Lawrence deviated from an acceptable medical practice or standard and that this deviation proximately resulted in an injury. Bruni v. Tatsumi, 46 Ohio

St.2d 127, 436 N.E.2d 73 (1976). The petitioner offered no evidence whatsoever to contradict the affidavit testimony of Dr. Lawrence that the latter did not deviate from any acceptable medical practice or standard and that any alleged deviation did not proximately result in any injury to the petitioner.

As stated by the Sixth Circuit, the petitioner's

> evidence in opposition to summary judgment is manifestly lacking. Undoubtedly, Ridder's counsel is aware that unsworn, and even unsigned, letters do not amount to admissible evidence. Ridder has thus failed to show facts giving rise to a genuine issue concerning Dr. Lawrence's deliberate indifference to serious medical needs or medical malpractice.

Ridder v. City of Springfield, No. 95-3358 (6th Cir. Mar. 13, 1997) (App. 1).

B. The Conduct Of The Magistrate Did Not Deprive The Petitioner Of Substantial Justice.

The petitioner, in his third question presented for review, claims that a denial of substantial justice resulted from the magistrate's (a) requiring adherence to more stringent pleading requirements, (b) enforcement of Rule 26 as it relates to disclosure of expert reports and (c) hostility toward counsel for the petitioner.

Dr. Lawrence's answer raised the defense of qualified immunity. By virtue of Veney v. Hogan, 70 F.3d 917, 919 (6th Cir. 1995) a complaint containing a section 1983 action against a government official must satisfy a heightened standard of pleading when a defendant raises the defense of qualified immunity. This heightened standard did not in any way affect the petitioner. The magistrate specifically found that the third amended complaint adequately pled facts to overcome Dr. Lawrence's defense of qualified immunity.

App. 60, 68. Further, any alleged heightened pleading requirement did not affect any substantial right of the petitioner since he took the depositions of Dr. Lawrence and the other defendants in June and July of 1994 and he had the deposition transcripts available at the time Dr. Lawrence filed the summary judgment motion. Thus, the petitioner could not have conceivably incurred any prejudice from any heightened pleading requirement..

Rule 26(a)(2) and (b) provide that a party proposing to use a witness retained or specifically employed to provide expert testimony must not only name the individual but must also submit a signed written report setting forth the opinions which the expert will express at trial. The magistrate held that the preclusion order did not apply to treating physicians "so long as they do not purport to testify beyond the scope of their own diagnosis and treatment ..." App. 149. As detailed in the preclusion order, the magistrate precluded the expert

testimony only after the petitioner, through repeated violations of the orders of the magistrate, failed to produce the required expert reports.

The magistrate, before commencement of discovery and in the middle of February 1994, advised counsel of the changes in the federal rules and of the new requirements relating to the filing of expert reports. After the petitioner claimed excusable neglect, the magistrate on July 11, 1994 indicated a willingness to review the preclusion order provided the petitioner demonstrated excusable neglect and submitted the required reports. The petitioner never filed any pleading claiming excusable neglect or filed any purported complying expert report until January 23, 1995; some ninety days after the discovery cut off, some twenty days after the filing of summary judgment motions and some six weeks before the scheduled trial. Under these circumstances, the

magistrate appropriately implemented the sanction of preclusion.

Even if the magistrate had made some error with respect to the preclusion order, this order did not result in the granting of summary judgment to Dr. Lawrence. The trial court granted and the appellate court sustained the order granting summary judgment because the petitioner failed to produce admissible evidence which established the existence of any serious medical need or any medical malpractice.

The contentions of the petitioner that the magistrate's personal feeling and hostility somehow entered into the granting of the summary judgment do not provide any basis for granting a writ of certiorari. As found by the Sixth Circuit and as supported by the evidence, the magistrate extended the petitioner every opportunity to litigate his claims. To paraphrase the appellate court, the magistrate gave the petitioner "every reasonable opportunity to litigate" his

claims and the magistrate has no responsibility for the "shortcomings" and the failure to "follow through" of his counsel. App. 11

VI. CONCLUSION

No compelling reason exists for this Court to grant for a writ of certiorari. Granting the writ, under the facts of this case, will require this Court to grant certiorari whenever a petitioner disagrees with the factual determinations made by a trial court and affirmed by an appellate court. This Court, accordingly, should deny the petition for writ of certiorari.

Respectfully submitted,

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